Public Prosecutor v Edy Ko'im bin Said & Ors and another case

HIGH COURT (KUALA LUMPUR) — CRIMINAL CASE NOS WA-45C–1–06 OF 2023 AND WA-45C–2–06 OF 2023
MUNIANDY J
30 APRIL 2024

Criminal Procedure — Jurisdiction of court — Transfer of case — Accused persons charged under s 3 of Kidnapping Act 1961 read together with s 34 of Penal Code — Offence of kidnapping punishable with death penalty at time of commission of offence — High Court seized with jurisdiction for trial of offence involving death sentence — Coming into force of Abolition of Mandatory Death Penalty Act 2003 — Abolition of death penalty for offence under s 3 of Kidnapping Act 1961 — Whether sessions court had jurisdiction to try all offences other than offences punishable with death — Whether case involving accused persons ought to be transferred to sessions court for trial — Whether order of transfer of case of accused persons to sessions court rendered offence committed less serious

The accused persons were charged for an offence of kidnapping pursuant to s 3 of the Kidnapping Act 1961 ('the Act') read together with s 34 of the Penal Code. At the time of the commission of the crime as well as the charge, the offence of kidnapping was punishable with death or imprisonment for life and shall, if not sentenced to death, also be liable to whipping. Resulting from that, the public prosecutor ('PP') had deemed it fit for the accused persons to be tried at the High Court. The PP had then issued her consent to institute prosecution against the accused persons pursuant to s 177A(1) of the Criminal Procedure Code ('the CPC') for the case against the accused person to be transmitted to the High Court for trial, although the said consent did not say so certainly in those terms, other than merely consenting to the prosecution of the accused persons. Not long after the issuance of the consent by PP, the Act was amended vide the Abolition of Mandatory Death Penalty Act 2023, whereby pursuant to s 52, the death penalty for an offence under s 3 of the Act was removed. With the removal, the court sentencing the accused persons could only mete out a sentence of imprisonment, which would be a minimum period of 30 years and up to a maximum period of 40 years, and with whipping. The issue that arose for determination was following the amendment of the Act vide the Abolition of the Mandatory Death Penalty Act 2003 ('Act 846'), whether the case involving the accused persons should be transferred to the sessions court for trial.

Held, transferring cases to sessions court for trial:

(1) Not long after the issuance of the consent by PP, the Act 365 was amended vide the Abolition of Mandatory Death Penalty Act 2023 (Act 846), whereby pursuant to s 52, the death penalty for an offence under s 3 of the Act 365 was removed. With the removal, upon finding of guilty and conviction of the accused persons, the court sentencing them could only mete out a sentence of imprisonment, which would be a minimum period of 30 years and up to a maximum period of 40 years, and with whipping (see para 10).

(2) Since the coming into force of the Act 846, the offences alleged to have been committed by the accused persons no longer attracted the death penalty, thus pursuant to ss 63 and 64 of the Subordinate Court Act 1948, the sessions court had jurisdiction to try such offences and upon conviction sentence the accused persons to a period of imprisonment as provided for by the amendment to the Act (see para 11).

(3) The court was bound by the rule of law as enshrined in s 52 of the Act 846, by which the sentence of death for such offence was abolished and substituted with a period of imprisonment ranging from 30 to 40 years. Hence, in accordance with s 52 of the Act 846 and pursuant to s 12 to the schedule of the CJA, the court was empowered to transfer this case involving the accused persons to the sessions court for trial. It was also expedient for the ends of justice for the accused persons to be tried in a court of competent jurisdiction, which was the sessions court (see paras 14–15).

(4) By ordering the transfer of the case involving the accused persons to the sessions court, it did not render the offences alleged to have been committed by the accused persons to be less serious. It was made as the rule of law demanded so pursuant to jurisdiction of the appropriate court to try the offence and the accused persons in a court of competent jurisdiction, which was the sessions court. Further, trial of the case involving the accused persons had not commenced in the High Court, as evidence had not begun to be adduced. Thus, the accused persons had not been vested with the right to be tried at the High Court. Their vested right was now for the case to be tried at the sessions court, which was the court of competent jurisdiction, in view of the punishment the offence alleged against them entailed (see para 23).

[Bahasa Malaysia summary

Mereka yang tertuduh telah didakwa atas kesalahan menculik menurut s 3 Akta Penculikan 1961 ('Akta') yang dibaca bersama s 34 Kanun Keseksaan. Pada masa jenayah tersebut dilakukan serta pertuduhan, kesalahan penculikan boleh dihukum mati atau penjara seumur hidup dan boleh, jika tidak dihukum mati, juga boleh dikenakan sebat. Ekoran daripada itu, pendakwa raya ('PP') telah menyifatkan wajar bagi tertuduh dibicarakan di Mahkamah Tinggi. PP

kemudiannya telah mengeluarkan persetujuannya untuk memulakan pendakwaan terhadap orang yang dituduh menurut s 177A(1) Kanun Tatacara Jenayah ('KTJ') untuk kes terhadap orang yang dituduh dihantar ke Mahkamah Tinggi untuk dibicarakan, walaupun persetujuan tidak menyatakan dengan kepastian atas syarat-syarat itu, selain daripada hanya bersetuju untuk pendakwaan orang yang dituduh. Tidak lama selepas pengeluaran persetujuan oleh PP, Akta telah dipinda mengikut Akta Pemansuhan Hukuman Mati Mandatori 2023, di mana menurut s 52, hukuman mati bagi kesalahan di bawah s 3 Akta tersebut telah dihapuskan. Dengan pengeluaran tersebut, mahkamah yang menjatuhkan hukuman terhadap tertuduh hanya boleh menjatuhkan hukuman penjara, iaitu tempoh minimum 30 tahun dan sehingga tempoh maksimum 40 tahun, dan dengan sebat. Isu yang timbul untuk pertimbangan adalah berikutan pindaan Akta mengikut Pemansuhan Akta Hukuman Mati Mandatori 2003 ('Akta 846'), sama ada kes membabitkan tertuduh perlu dipindahkan ke mahkamah sesyen untuk dibicarakan.

Diputuskan, memindahkan kes ke mahkamah sesyen untuk dibicarakan:

(1) Tidak lama selepas pengeluaran persetujuan oleh PP, Akta 365 telah dipinda mengikut Akta Pemansuhan Hukuman Mati Mandatori 2023 (Akta 846), di mana menurut s 52, hukuman mati bagi kesalahan di bawah s 3 Akta 365 telah dikeluarkan. Dengan pengeluaran tersebut, apabila didapati bersalah dan sabitan ke atas tertuduh, mahkamah yang menjatuhkan hukuman kepada mereka hanya boleh menjatuhkan hukuman penjara, iaitu tempoh minimum 30 tahun dan sehingga tempoh maksimum 40 tahun, dan dengan sebatan (lihat perenggan 10).

(2) Sejak Akta 846 mula berkuat kuasa, kesalahan yang didakwa dilakukan oleh tertuduh tidak lagi dikenakan hukuman mati, justeru menurut s 63 dan 64 Akta Mahkamah Rendah 1948, mahkamah sesyen mempunyai bidang kuasa untuk membicarakan kesalahan tersebut dan apabila disabitkan menjatuhkan hukuman penjara kepada tertuduh seperti yang diperuntukkan oleh pindaan Akta (lihat perenggan 11).

(3) Mahkamah terikat dengan kedaulatan undang-undang seperti yang termaktub dalam s 52 Akta 846, yang mana hukuman mati bagi kesalahan tersebut telah dimansuhkan dan digantikan dengan tempoh penjara antara 30 hingga 40 tahun. Oleh itu, selaras dengan s 52 Akta 846 dan menurut s 12 kepada Jadual Akta Kehakiman, mahkamah diberi kuasa untuk memindahkan kes yang melibatkan tertuduh ini ke mahkamah sesyen untuk dibicarakan. Ia juga wajar bagi kemuktamadan keadilan bagi orang yang dituduh dibicarakan di mahkamah yang mempunyai bidang kuasa yang kompeten, iaitu mahkamah sesyen (lihat perenggan 14–15).

(4) Dengan mengarahkan pemindahan kes yang melibatkan tertuduh ke

mahkamah sesyen, ia tidak menjadikan kesalahan yang didakwa telah dilakukan oleh tertuduh menjadi kurang serius. Ia dibuat kerana kedaulatan undang-undang menuntut sedemikian menurut bidang kuasa mahkamah yang berkenaan untuk membicarakan kesalahan dan orang yang dituduh di mahkamah yang mempunyai bidang kuasa yang kompeten, iaitu mahkamah sesyen. Selanjutnya, perbicaraan kes yang melibatkan tertuduh belum bermula di Mahkamah Tinggi, kerana keterangan belum mula dikemukakan. Oleh itu, tertuduh tidak diberi hak untuk dibicarakan di Mahkamah Tinggi. Hak mereka sekarang adalah untuk kes itu dibicarakan di mahkamah sesyen, yang merupakan mahkamah bidang kuasa kompeten, memandangkan hukuman yang dikenakan terhadap kesalahan yang didakwa terhadap mereka (lihat perenggan 23).]

Cases referred to

Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356, FC (refd)
Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors [2021] 5 MLJ 320, FC (refd)
Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443, FC (refd)
PP v An Kee Cheng & Anor [2006] 3 MLJ 454; [2006] 5 CLJ 427, HC (refd)
PP v Cheah Cheng Eng [1986] 2 MLJ 39; [1986] 1 CLJ 303 (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
PP v Lim Shui Wang & Ors [1979] 1 MLJ 65, FC (refd)
PP v Su Liang Yu [1978] 2 MLJ 79 (refd)
Savrimuthu Sinappan v PP [1987] 2 MLJ 173, SC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526, FC (refd)
Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209; [2021] 6 CLJ 199, FC (refd)

Legislation referred to

Abolition of Mandatory Death Penalty Act 2023 ss 2, 52
Courts of Judicature Act 1964 ss 12, 22, 22(1)(a)(i), (2), 25(2), 48
Criminal Procedure Code ss 128(1), 177A, 177A(1), (3), 259(1), 388(1), 417, 418A
Dangerous Drugs Act 1952 s 41B
Federal Constitution arts 121(1), 145(3), (3A)
Kidnapping Act 1961 s 3
Land Acquisition Act 1960 s 40D
Penal Code ss 34, 302, 365
Subordinate Courts Act 1948 ss 63, 64

Kalmizah bt Saleh (with Sabri bin Othman, Nur Aqilah Ishak, Akmalzatul bt Mohamed Nawi and Amir Hannif) (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Rose Anuar Aripin (Kelvin Sidhu & Partners) for the first and ninth accused.

Tina Ong (Norma Goh & Co) for the second, third, fourth, fifth, sixth, seventh and eighth accused.

Mohd Amin Abdullah (with Julie Faralisa) (A M Zaharil & Co) for the tenth accused.

Sofea Shereen (with Wan Mohd Ariff Ameer) (Jagjit Ariff & Co) for the 11th accused.

Muniandy J:

[1] The accused persons in both cases before this court are charged for an offence of kidnapping pursuant to s 3 of the Kidnapping Act 1961 ('Act 365') read together with s 34 of the Penal Code ('the PC/Act 574'), being common intention as their mode of participation in the crime.

[2] The charges are:

Case No WA-45C–1–06 Tahun 2023

Bahawa kamu dengan secara niat bersama pada 28 September 2022 jam lebih kurang 10.40 malam, di Jalan Mayang dalam Daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur, telah menahan Omar ZM Albelbaisy Raeda, No Pasport: 4988330 dengan tidak berpatutan untuk mendapat ganjaran yang berupa rahsia maklumat membuat dan menyahaktif perisian computer yang digunakan untuk menggodam telefon bimbit dan dengan ini kamu telah melakukan satu kesalahan yang boleh dihukum dibawah seksyen 3 Akta Penculikan 1961 [Akta 365] dan dibaca bersama-sama seksyen 34 Kanun Keseksaan.

Hukuman:

Jika disabitkan kesalahan hendaklah dijatuhkan hukuman penjara tidak kurang dari tiga puluh tahun tetapi tidak melebihi empat puluh tahun dan dengan sebatan.

Case No WA-45C-2–06 Tahun 2023

Bahawa kamu dengan secara niat bersama pada 28 September 2022 jam lebih kurang 10.40 malam, di Jalan Mayang dalam Daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur, telah menahan Omar ZM Albelbaisy Raeda, No Pasport: 4988330 dengan tidak berpatutan untuk mendapat ganjaran yang berupa rahsia maklumat membuat dan menyahaktif perisian computer yang digunakan untuk menggodam telefon bimbit dan dengan ini kamu telah melakukan satu kesalahan yang boleh dihukum dibawah seksyen 3 Akta Penculikan 1961 [Akta 365] dan dibaca bersama-sama seksyen 34 Kanun Keseksaan.

Hukuman:

Jika disabitkan kesalahan hendaklah dijatuhkan hukuman penjara tidak kurang

dari tiga puluh tahun tetapi tidak melebihi empat puluh tahun dan dengan sebatan. A

[3] At the time of commission of crime as well as charge, the offence of kidnapping alleged to have been committed by the accused persons is punishable with death or imprisonment for life and shall, if not sentenced to death, also be liable to whipping. B

[4] Resulting from that the public prosecutor ('PP') had deemed it fit for the accused persons to be tried at the High Court. This is also because pursuant to s 22(1)(a)(i) of the Courts of Judicature Act 1964 ('CJA/Act 91'), the High Court shall have jurisdiction to try all offences committed within its local jurisdiction. Further, pursuant to s 22(2) of the CJA, the High Court may pass any sentence allowed by law. As for the sessions court, it has jurisdiction to try all offences other than offences punishable with death pursuant to s 63 of the Subordinate Courts Act 1948 ('SCA/Act 92') and s 64 of the SCA provides that the sessions court may pass sentence allowed by law other than the sentence of death. Therefore, a sentence of death could be only meted out by the High Court. C D

[5] Flowing from the view point of jurisdiction to try and sentence by the High Court, the PP via his deputy public prosecutor ('DPP') had issued her consent to institute prosecution against the accused persons pursuant to s 177A(1) of the Criminal Procedure Code ('CPC/Act 593') so that both the cases involving the accused persons be transmitted to the High Court for trial, although the said consent does not say so certainly in those terms, other than merely consenting to the prosecution of the accused persons. That per se indicates, what matters to the PP is the prosecution of the accused persons and not the venue or place of trial, be it the High Court or sessions court. However, the saving grace is, s 177A(1) of the CPC is cited in the said consent. Accordingly, this court has to fix a date of trial for the case against the accused persons pursuant to s 177A(3) of the CPC. For completeness, s 177A of the CPC renders the following: E F G

(1) A prosecution in respect of an offence which is to be tried by the High Court in accordance with Chapter XX, shall not be instituted except by or with the consent of the Public Prosecutor: H

Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained. I

(2) In any prosecution pursuant to subsection (1), the accused shall be produced before the Magistrate's Court which shall, after the charge has been explained to him, transmit the case to the High Court and cause the accused to appear or be brought before that Court as soon as may be

practicable:

Provided that when the accused is brought before the Magistrate's Court before the Public Prosecutor has consented to the prosecution, the charge shall be explained to him but he shall not be called upon to plead thereto.

(3) When the accused appears or is brought before the High Court in accordance with subsection (2), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

[6] On the intent and purport of s 177A of the CPC, I can do no more but to refer and quote the dictum of Her Ladyship Zaharah Ibrahim JC (later Chief Judge of Malaya) in the case of *Public Prosecutor v An Kee Cheng & Anor* [2006] 3 MLJ 454; [2006] 5 CLJ 427 at p 458 (MLJ); 430 (CLJ):

...

Position under the Criminal Procedure Code

[12] Upon the coming into force of Act A908 on 17 February 1995, preliminary inquiries ceased to exist. So did trials by jury or assessors in the High Courts. Consequently, from 17 February 1995 all cases to be tried in the High Court no longer need to go through the process of preliminary inquiry and all criminal cases tried by the High Court are tried before a judge sitting alone.

[13] Act A908 (via s 8) also inserted the provisions of s 177A into the CPC. According to the Explanatory Statement to the Bill by which Act A908 was enacted:

4. Clause 8 provides for the transmission of cases to the High Court, without holding a preliminary inquiry under Chapter XVII of the Code, to be tried by such Court.

[14] The cl 8 mentioned in the Explanatory Statement to the Bill is s 8 of Act A908 which inserted s 177A.

[15] Section 177A of the CPC reads as follows:

... (as reproduced above)

[16] As mentioned above, the Explanatory Statement to the Bill by which Act A908 was enacted does not state why the consent of the Public Prosecutor is required for the transmission of cases to the High Court. The speech introducing the Bill in Parliament did not give any explanation for the insertion of the consent requirement either.

[17] However, I am of the opinion that such consent is in lieu of the committal order which previously could only be made by a magistrate at the end of a preliminary inquiry, after evidence by deposition had been taken by the magistrate and he was satisfied that there was sufficient evidence for the case to be tried in the High Court. This filtering process through preliminary inquiries has clearly now been replaced with the process of filtering through the mechanism of the public prosecutor's consent. Such filtering process is not capable of being performed by a magistrate after the abolition of preliminary inquiries. At the stage of the case before the magistrate as in the case of Case No 45–143–2005 and Case No 45–164–2005,

only the public prosecutor has the capacity, with all the information available to him or which he is capable of obtaining from the police or other enforcement agencies, to determine whether there is sufficient evidence for the case to be tried by the High Court in accordance with Chapter XX of the CPC.

[18] Under cl (3) of art 145 of the Federal Constitution, the Attorney General has the discretionary power to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial. Further according to cl (3A) of that article, federal law may confer on the Attorney General power to determine the courts in which any proceedings which he has power to institute shall be instituted or to which the proceedings shall be transferred. According to sub-s 376 (1) of the CPC, the Attorney General is the public prosecutor.

[19] From the decision of the Supreme Court in the case of *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544; [1991] 2 CLJ 1458; [1991] 1 CLJ Rep 183, it is clear how wide the discretionary power of the public prosecutor is under cl (3) of art 145 of the Federal Constitution. In that case, the Supreme Court said:

> For our immediate purpose we wish to refer to art 145(3) of the Constitution which states that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before Syariah Court, etc ... The discretion vested in the Attorney General is unfettered and cannot be challenged and substituted by that of the court's. The reasoning and logic behind such contention is well illustrated in the cases of *Public Prosecutor v Lee Tin Bau* [1985] 1 MLJ 388, *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152, *Public Prosecutor v Datuk Harun bin Haji Idris and Ors* [1976] 2 MLJ 116 and *Poh Cho Ching v Public Prosecutor* [1982] 1 MLJ 86. In the circumstances, is superfluous to reiterate the same points.

[20] As such, the requirement for consent in s 177A of the CPC, as is the requirement for consent in s 39B of the DDA, is consistent with the provisions of cll (3) and (3A) of art 145 of the Federal Constitution.

...

[23] If so, then ALL transmissions of cases to the High Court to be tried in accordance with Chapter XX of the CPC must comply with the provisions of s 177A of the CPC and without fail the consent of the public prosecutor must be obtained before a case is transmitted to the High Court.

...

[7] Following on from the above decision in the case of *An Kee Cheng*, the PP with all the information available to him would determine whether a criminal case ought to be tried by the High Court in accordance with Chapter XX of the CPC. In any event, his foremost consideration would be jurisdiction of the court to try an accused person and its jurisdiction to sentence him pursuant to the law. In the present case, when the consent to institute prosecution was issued by the PP, the offence alleged to have been committed by the accused

persons under s 3 of Act 365, is triable by the High Court as the offence is punishable with death or imprisonment for life. As death is one of the sentencing option available, the accused persons could not be tried at the sessions court, thus the necessity for consent to institute prosecution pursuant to s 177A(1) of the CPC.

[8] Moreover, as decided by our Chief Justice in the case of *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209; [2021] 6 CLJ 199, that the Attorney General as the PP could only exercise his prosecutorial discretion to institute prosecution in accordance with the law, otherwise the decision made is subject to the scrutiny of the court, thus reviewable. Hence, his prosecutorial discretion is subject to legal limits (see also the decision of the Federal Court in the case of *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443). The discretion and decision of the PP to institute prosecution against the accused persons in this case, would also include transmission of the case for trial at the High Court by issuance of his consent pursuant to s 177A(1) of the CPC.

[9] The deputy public prosecutor ('DPP') appearing for the prosecution in these cases, had argued that the cases ought to remain in this court for trial for the following reasons:

(a) the removal of death penalty for an offence of kidnapping pursuant to s 3 of Act 365 does not take away the jurisdiction of the High Court to try the offence committed by the accused persons;

(b) this court could still try such an offence, pursuant to s 22 of the CJA, as the offence of kidnapping by the accused persons was committed within its local jurisdiction at the district of Dang Wangi, Kuala Lumpur; and

(c) if the Parliament had intended to take away the jurisdiction of the High Court to try such an offence and confer it on the sessions court to do so, it would have done so by making provision for the sessions court exclusive jurisdiction to try such an offence.

[10] Not long after issuance of the consent by PP, Act 365 was amended vide the Abolition of Mandatory Death Penalty Act 2023 ('Act 846'), whereby pursuant to s 52, the death penalty for an offence under s 3 of Act 365 was removed. With the removal, upon finding of guilty and conviction of the accused persons, the court sentencing them could only mete out a sentence of imprisonment, which would be a minimum period of 30 years and up to a maximum period of 40 years, and with whipping. The long title to Act 846, s 2 and s 52 reads as the following:

An Act to amend the Penal Code, the Firearms (Increased Penalties) Act 1971. The

Arms Act 1960, the Kidnapping Act 1961, the Dangerous Drugs Act 1952, the Strategic Trade Act 2010 and the Criminal Procedure Code in order to abolish the mandatory death penalty, to vary the sentence relating to imprisonment for natural life and whipping and to provide for matters connected therewith.

...

Amendment of Acts

2. The Penal Code [Act 574], the Firearms (Increased Penalties) Act 1971 [Act 37], the Arms Act 1960 [Act 206], the Kidnapping Act 1961 [Act 365], the Dangerous Drugs Act 1952 [Act 234], the Strategic Trade Act 2010 [Act 708] and the Criminal Procedure Code [Act 593] are amended in the manner specified in Parts II, III, IV, V, VI, VII and VIII respectively.

Part V

AMENDMENT TO THE KIDNAPPING ACT 1961

Amendment of section 3

52. The Kidnapping Act 1961, which is referred to as the 'principal Act' in this Part, is amended in subsection 3(1) by substituting for the words 'with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping' the words 'with imprisonment for a term of not less than thirty years but not exceeding forty years and with whipping'.

Transitional

53. Upon the coming into operation of this Act, if a person is convicted by any court for the commission of an offence under section 3 of the principal Act, the person, whether at a trial or on an appeal, shall be sentenced in accordance with the provisions of the principal Act as amended by this Act even though the offence was committed before the date of coming into operation of this Act.

[11] Therefore, since coming into force of Act 846, the offences alleged to have been committed by the accused persons, no longer attract the death penalty, thus pursuant to ss 63 and 64 of the SCA, the sessions court has jurisdiction to try such offences and upon conviction sentence the accused persons to a period of imprisonment as provided for by the amendment to Act 365. It reads as follows:

63 Criminal Jurisdiction

A Sessions Court shall have jurisdiction to try all offences other than offences punishable with death.

64 Sentences

A Sessions Court may pass any sentence allowed by law other than the sentence of death.

[12] With that resolve, pursuant to s 12 to the schedule of the CJA which has

to be read with s 25(2) of the same Act which provides:

> (1) ...
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.
>
> Paragraph 12 of the Schedule to the Courts of Judicature Act 1964 further provides:
>
> *Transfer of proceedings.*
>
> *Power to transfer any proceedings to any other Court or to or from any subordinate court*, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of court. (Emphasis added.)

renders for this court on its own initiative to make an order of transfer of this case involving the accused persons to the sessions court and be tried there.

[13] The order of transfer made does not in any manner obviate the significance of the consent of the PP which was issued on 13 June 2023 pursuant to s 177A(1) of the CPC read together with art 145(3A) of the Federal Constitution ('the FC'). The said clause of the supreme law reads:

> (3A) Federal Law may confer on the Attorney General power to determine the courts in which or the venue at which any proceedings which he has power under Clause (3) to institute shall be instituted or to which such proceedings shall be transferred.

[14] For all intents and purposes, the said consent by the PP was issued before Act 846 came into force on 4 July 2023, when the prevailing sentence for an offence of kidnapping pursuant to Act 365 was death or imprisonment of life. But currently, this court is bound by the rule of law as enshrined in s 52 of Act 846, by which the sentence of death for such offence is abolished and substituted with a period of imprisonment ranging from 30 to 40 years.

[15] Hence, in accordance with s 52 of Act 846 and pursuant to s 12 of the schedule to the CJA, this court is empowered to transfer this case involving the accused persons to the sessions court for trial. It is also expedient for the ends of justice for the accused persons to be tried in a court of competent jurisdiction, which is the sessions court.

[16] Besides s 417 of the CPC, the power of transfer is also given to the High Court in the CJA in s 12 of the schedule which allows for transfer of a criminal

case to the sessions court for trial. That provision makes it obvious for the High Court to transfer a case from itself to a subordinate court, which cannot be done pursuant to s 417 of the CPC, which only caters for lateral transfers (High Court to another High Court or subordinate court to another subordinate court) or vertical transfers (subordinate court to High Court) (see also the case of *Public Prosecutor v Cheah Cheng Eng* [1986] 2 MLJ 39; [1986] 1 CLJ 303). I am mindful of the dictum by Hashim Yeop Sani J (as he then was) in the case of *Public Prosecutor v Su Liang Yu* [1978] 2 MLJ 79, where His Lordship had remarked that the power under s 12 of the schedule to the CJA should not be taken lightly. Further in the case of *Public Prosecutor v Lim Shui Wang & Ors* [1979] 1 MLJ 65, it was decided by Suffian LP that in relation to s 12 of the schedule to the CJA, there is no power for transfer of cases to the subordinate court because the power to do so under s 12 is subjected to any written laws or rules of court relating to the same, thus the judge's power in s 12 is to that extent limited. It has to be noted that His Lordship Sufian LP did not decide that such a transfer is not possible, but only that the power to do so is limited by virtue of any written law or rules of court. Furthermore, the issue for determination in that case centred around the fact if the High Court was correct in transferring the case involving three respondents who were charged with the offence of drug trafficking and at the end of the preliminary enquiry, all three of them were committed for trial in the High Court. The High Court, however, made orders transferring them for trial in the then special sessions court. The PP applied for a stay of the trials and referred some questions to the Federal Court under s 48 of the CJA (now repealed), which in effect required the court to rule whether the learned judge had the power to transfer the cases to the subordinate court, and if so whether he properly exercised that power. Suffian LP, delivering the judgment of the court, when referring to s 418A of the CPC said that once a case has been so transferred, the High Court has no alternative but to fix a date for the accused's trial which shall be held in accordance with the procedure under Chapter XX of the CPC. Hence, the circumstance in that case was different, where the three accused persons were committed for trial at the High Court after a preliminary inquiry was held. It is unlike in the present case, where the accused persons are required to be tried at this court, pursuant to a consent by the PP pursuant to s 177A (1) of the CPC on the premise that the offence of kidnapping with which they are charged, was an offence (prior to amendment to Act 365) punishable with death, thus only triable by the High Court. Thus, the issue of applicability of s 417 of the CPC or s 12 of the schedule of the CJA does not arise in that case. His Lordship Suffian LP was only referring to the provisions on transfer of a criminal case in the CPC as well as the CJA and commenting on it before deciding on the points of law referred to the Federal Court.

[17] Although s 12 to the schedule of the CJA says the provision is applicable subject to written law or rules of court but it is worded in absolute terms that this court could transfer a criminal case to the subordinate court with ease, if

A the circumstance of the case permits for this court to do so. It's even made swifter as the CPC which is the only written law that deals with transfer of cases does not provide for such a transfer, down to the sessions court from the High Court, but s 12 of the schedule to the CJA enables this court to do so. The circumstance allowing for such a transfer pursuant to s 12 is also not closed. B Thus, the prevailing circumstance in the present case, with the coming into force of Act 846, certainly allows for s 12 of the schedule to the CJA to apply.

[18] Furthermore, once the criminal case reaches the court, it is seized with jurisdiction and power over the case including the power to transfer the said C case to another court, not randomly but if circumstance of the case renders it necessary and the law permits to do so, which in the present case, is the applicability of s 12 to the schedule of the CJA. This would be regardless of the consent by the PP issued pursuant to s 177A of the CPC to institute D prosecution as the PP has no power over the case anymore. The court is not subject to the dictates of the prosecution, once it has taken cognisance of the offence committed by the accused pursuant to s 128(1) of the CPC, when he was brought to the court to be charged, upon completion of remand period pending investigation against him. The court would then take full charge and E control of the criminal proceeding. It is bestowed with jurisdiction to grant the necessary and appropriate order so as to ensure justice is served, materially so to the accused person, since he had been remanded in custody pending trial. At this juncture, it is also prudent to refer and quote the dictum of His Lordship Mohd Azmi FCJ (as he then was), forming part of the majority judgment of the F Supreme Court in the case of *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 at p 323, where His Lordship decided that:

> ... the normal legal position was that once the court had taken cognisance of the offence and was seized with jurisdiction to try the case, the institution of the proceedings by the public prosecutor was complete, because not only had the public G prosecutor successfully invited the court to take action, but also it was the scheme of the Criminal Procedure Code that trial follows cognisance and cognisance would be preceded by investigation. Criminal proceedings are in fact not instituted until the court has taken cognisance of the offence or offences under one or other of the clauses of subsection (1) of s 128 CPC, a host of judicial powers will flow to enable H the court to proceed to trial and determine the dispute between the parties in accordance with law. In general, the court taking cognisance of the offence, is the dividing line between the sphere and domain of the Executive and the Judiciary, for cognisance by the court signals the submission of the Executive to the jurisdiction of the court and marks the completion of the exercise of Executive power to 'institute' the criminal proceedings. From then on, the whole conduct of the I proceedings should be within the exclusive judicial power of the court until its conclusion ...

[19] Thus, the judicial power exercised by this court shall not be trammelled or encroached upon. Such is also the state of the law of the land, and it has lately

received judicial endorsement in most of the recent cases like *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526, where our apex court had struck down s 40D of the Land Acquisition Act 1960 for being ultra vires the Federal Constitution. It had decided in absolute terms that it is not possible for Parliament to pass laws that have the effect of diluting the exercise of judicial power by the Judiciary because the Federal Constitution which is our supreme law vests that power in the Judiciary. The concept of judicial power is described as follows:

> Judicial power is the power every Sovereign State must of necessity have, to decide controversies between its subjects or between itself and its subjects, whether the rights related to life, liberty or property.

The other apex court decision echoing the same principles are *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356 as well as *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [2021] 5 MLJ 320. In the context of the present case, the power to transfer as alluded to above is a judicial power bestowed upon this court to exercise in terms of the law available, which is s 12 to the schedule of the CJA, wherein its wording does not limit the extent of its application and applicability, since this court is allowed by law to transfer the case involving the accused persons to the sessions court.

[20] This court expresses disquiet over the position taken by the defence counsel ('DC') for the accused persons, whom had all merely left it to this court to decide on the issue of transfer, albeit being objected to by the PP. By doing so, it only behoves this court to accordingly enforce the rule of law applicable. Counsel for the accused persons ought to have been mindful of the right of the accused persons to be tried in a court of competent jurisdiction, unhindered. They cannot take the position that the case could be tried in any court, including the High Court, when the law demands that it ought to be tried in the subordinate court in view of the alteration of the punishment prescribed by the law which has now become lighter as opposed to a death penalty previously. For the record, the fourth accused Tengku Arif Bongsu bin Tengku Hamid in Case No WA–45C-1–06 of 2023, had on his volition informed this court during the proceeding that he subscribes to the position that since there is not an issue of payment of '*wang tebusan*', the charge against him ought to be for an offence under s 365 of the PC which attracts a lighter punishment of an imprisonment term which may extend to seven years. His representation to this court is viewed as his legitimate expectation, but of course subject to the prosecutorial discretion and consideration by the PP pursuant to art 145(3) of the FC.

[21] Be that as it is, based on the reasons given above, this court now transfer the cases involving the accused persons to the sessions court Kuala Lumpur and

to be tried there. With that, any further application henceforth, including application for bail etc, is to be dealt with in that court, being the trial court. The cases transferred are Criminal Case No WA-45C-1&2–06 of 2023.

[22] It is also noteworthy that the sessions court is in an advantageous position to fix an early date for trial of the accused persons as well as continuous dates, if required. This court would not be able to do so, as it is lumbered with many cases involving the death penalty, namely for offences of drug trafficking and murder, where the accused persons have been remanded in custody pending trial. Furthermore, with the advent of the Covid-19 pandemic, the accused persons were restricted in their movement from and to the prison due to the imposition of a movement control order ('MCO'), leaving the cases postponed until the lifting of the said MCO, much later. And now with the lifting and business as usual for the court, the postponed cases are to be tried and disposed of forthwith without any more delay. Logically, those cases would rank in top priority and precedence for trial in this court as opposed to the present case involving the accused persons whom are not facing the death penalty anymore but on conviction could only be punished with a term of imprisonment. In law, the offence allegedly committed (subject to proof) by them is a non-bailable offence, and they may be released on bail, subject to the discretion of court pursuant to s 388(1) of the CPC. The position is unlike for the accused persons who are charged for an offence of drug trafficking, which is unbailable pursuant to s 41B of the Dangerous Drugs Act 1952 ('DDA/Act 234'). As for the accused persons charged for an offence of murder pursuant to s 302 of the PC, it is also a non bailable offence, and it is always the tendency for the court not to grant bail unless special circumstances are shown that they are entitled to be released on bail or the exceptions provided for in s 388(1) of the CPC applies. Thus, they are also remanded in custody pending trial.

[23] In a nutshell, the reasons for ordering the case involving the accused persons to be transferred to the sessions court are the following:

(a) the rule of law demands that the criminal case involving all the accused persons be tried at a court of competent jurisdiction, which is the sessions court;

(b) not to breach the provision of our supreme law, *to wit* art 121(1) of the FC which provides that:

> There shall be two High Courts of co-ordinate jurisdiction and status, namely —
>
> (a) ...
>
> (b) ...
>
> and such inferior courts as may be provided by federal law, and *the High Courts and inferior courts shall have such jurisdiction and powers as may be*

conferred by or under federal law. (Emphasis added.)

(c) the federal law via Act 846 has deemed it fit and appropriate for the death penalty to be totally removed for a kidnapping offence, thus conferring the sessions court jurisdiction to try such offences in accordance with the federal law;

(d) since Act 365 has been amended, and the alleged offence of kidnapping committed by the accused persons does not trigger the death penalty anymore, it is only befitting and appropriate for them to be tried at the sessions court pursuant to s 63 of the SCA;

(e) in the absence of any other evidence to the contrary on record, it is deemed that the PP when transmitting the case to this court for trial pursuant to his discretion to institute prosecution under art 145(3) of the FC, had only the foremost consideration that since the offence was punishable with death (prior to amendment to s 3 of Act 365), it ought to be tried at the High Court and not to remain at the subordinate court for trial;

(f) the PP when transmitting the case was also observing the provision of the supreme law, *to wit* art 121(1) of the FC as only the High Court has jurisdiction to try the accused persons, pursuant to Act 365, prior to its amendment. Now the same federal law has been amended to remove the death penalty for a kidnapping offence and substituting it with terms of imprisonment, thus rendering the case to be tried at the sessions court, which the sessions court is competent to mete out;

(g) by ordering transfer of the case involving the accused persons to the sessions court, it does not render the offences alleged to have been committed by the accused persons to be less serious. It is made as the rule of law demands so pursuant to jurisdiction of the appropriate court to try the offence and the accused persons in a court of competent jurisdiction, which is the sessions court; and

(h) trial of the case involving the accused persons has not commenced in this court, as evidence has not begun to be adduced. Thus, the accused persons have not been vested with the right to be tried at the High Court. Their vested right is now for the case to be tried at the sessions court, which is the court of competent jurisdiction, in view of the punishment the offence alleged against them entails (see, by analogy the case of *Savrimuthu Sinappan v Public Prosecutor* [1987] 2 MLJ 173).

[24] The accused persons in the present case were duly informed of the order of transfer made and that the case involving them is to be mentioned at the sessions court on 19 January 2024. Likewise, their remand period pending trial is also extended pursuant to s 259(1) of the CPC.

Case transferred to session court for trial.

Reported by K Selvaraju